INDEX

Response to Questions Presented 1

Other Questions Reserved 4

Material Submitted in Appendix 4

Response to Statement of the Case 5

Response to Petitioner's Stated Reasons—

I. There Is No Conflict with a Prior Decision of This Court in This Case 13

II. The Decision Below Does Not Conflict with Prior Decisions of Other Courts of Appeal or of This Court 15

III. The Case Presents No New Important Questions Requiring Settlement by This Court 25

IV. It Is Immaterial Whether This Case Will Govern or Have Any Effect on a Companion Criminal Contempt Case 28

Conclusion 29

Appendices—

Appendix A—Order of Chancery Court Dated March 10, 1964, Directing the Parties to Proceed with the Trial on March 11, 1964 ..... A1

Appendix B—Injunction Issued by the Oklahoma District Court Against Enforcement of Decree and for Re-Trial but Allowing All Parties to Participate on Koehring's Appeal to the Supreme Court of Mississippi A2

Appendix C—Opinions of the Supreme Court of Mississippi, Reported in 178 So.2d 838 and 182 So.2d 580 ..... A5

Appendix D—Judgment of Supreme Court of Mississippi, Dated February 7, 1966 ..... A45

Appendix E—Motion of Hyde Construction Company Filed in the Oklahoma District Court,

Styled "Amended and Supplemental Motion to Dissolve Injunction and Vacate Order of Civil Contempt and to Dismiss Cause A46

Appendix F—Opinion of the Court of Appeals for the Tenth Circuit on Hyde's Appeal from the Order Denying the Amended and Supplemental Motion (388 F.2d 501) A50

Appendix G—Excerpt from Brief of Respondent on Petition of Koehring (No. 567) for Certiorari Review of Order Overruling Motion to Dismiss Appeal (Certiorari Denied 385 U.S. 949, 87 S.Ct. 323) A67

TABLE OF CASES

Alleghany Corporation v. *Kerby*, (C.A. 2) 340 F.2d 311 27

American Ins. Co. v. *Lester*, (C.A. 4) 214 F.2d 578 16

American Surety Co. v. *Baldwin*, 287 U.S. 156, 53 S.Ct. 98, 77 L.Ed. 231 ..... 27, 28

Angel v. *Bullington*, 330 U.S. 183, 67 S.Ct. 657 27

Baldwin v. *Iowa State Traveling Men's Ass'n*, 283 U.S. 522, 51 S.Ct. 517, 75 L.Ed. 1244 27

Ballard v. *United States*, 329 U.S. 187, 67 S.Ct. 261, 91 L.Ed. 832 15

Briggs v. *Pennsylvania R. Co.*, 334 U.S. 304, 68 S.Ct. 1039 14

Central Nat. Bank of Boston v. *Stevens*, 169 U.S. 432, 18 S.Ct. 402, 42 L.Ed. 807 27

Chas. Wolff Packing Co. v. *Court of Industrial Relations*, 267 U.S. 552, 45 S.Ct. 441, 69 L.Ed. 785 15

Dairy Distributors v. *Western Conference of Teamsters*, (C.A. 10) 294 F.2d 348 27

Davis v. *Davis*, 305 U.S. 32, 59 S.Ct. 3, 88 L.Ed. 26 27-28

Dean Hill Country Club v. *City of Knoxville*, (C.A. 6) 379 F.2d 321 27

Deeds v. *Gilmer*, 162 Va. 157, 174 S.E. 37 25

Denver-Greeley Valley Water Users Assn. v. *McNeil*, (C.A. 10) 131 F.2d 67 24

Donovan v. *City of Dallas*, 377 U.S. 408, 84 S.Ct. 1579, 12 L.Ed.2d 409 28
Durfee v. *Duke*, 375 U.S. 106, 84 S.Ct. 242, 11 L.Ed.2d 186 27
Ex parte Union Steamboat Company, 178 U.S. 317, 20 S.Ct. 904, 44 L.Ed. 1084 14
Frazier v. *East Baton Rouge Parish School Bd.*, (C.A. 5) 363 F.2d 861 27
Hartford Life Ins. Co. v. *Blincoe*, 255 U.S. 129, 41 S. Ct. 276, 65 L.Ed. 549 15
Heiser v. *Woodruff*, 327 U.S. 726, 66 S.Ct. 853, 90 L.Ed. 970 27
Hill v. *Martin*, 296 U.S. 393, 56 S.Ct. 278, 70 L.Ed. 293 27
Hyde Construction Company v. *Koehring Company*, (C.A. 10, 1965) 348 F.2d 643 13
In re Potts, 166 U.S. 263, 17 S.Ct. 520 14
Johnson v. *Muelberger*, 340 U.S. 581, 71 S.Ct. 474, 95 L.Ed. 552 27
Kline v. *Burke Constr. Co.*, 260 U.S. 226, 43 S.Ct. 79, 67 L.Ed. 226, 24 A.L.R. 1077 ..... 21, 26
Koehring Company v. *Hyde Construction Company*, (Nov. 1966) 385 U.S. 949, 87 S.Ct. 323 ..... 2, 13
Koehring Company v. *Hyde Construction Company*, (1966) 382 U.S. 362, 86 S.Ct. 522, 15 L.Ed.2d 416 13
Lavasek v. *White*, (C.A. 10) 339 F.2d 861 27
Moss v. *Burkhart*, 220 F.Supp. 149 17
Mutual Life Insurance Co. v. *Hill*, 183 U.S. 551, 24 S.Ct. 538, 48 L.Ed. 788 14-15
Mutual Reserve Fund Life Assn. v. *Philps*, 190 U.S. 147, 23 S.Ct. 707, 47 L.Ed. 987 27
Parnacher v. *Mount*, (C.A. 10) 207 F.2d 788, cer. den. 347 U.S. 917, 74 S.Ct. 515, 98 L.Ed. 1073, rehearing den. 347 U.S. 940, 74 S.Ct. 626, 98 L.Ed. 1089 27
Penn General Casualty Co. v. *Commonwealth of Pennsylvania ex rel. Schnader*, 294 U.S. 189, 55 S.Ct. 386, 79 L.Ed. 850 23
Prack v. *Weissinger*, (C.A. 3) 276 F.2d 446 16

Re Sanford Fork & Tool Company, 160 U.S. 247, 16 S.Ct. 291, 40 L.Ed. 414 14
Sherrer v. *Sherrer*, 334 U.S. 343, 68 S.Ct. 1087, 92 L.Ed. 1429 27
Sprague v. *Ticonic Nat. Bank*, 307 U.S. 161, 59 S.Ct. 777, 83 L.Ed. 1148 14
Tanner Motor Livery, Ltd. v. *Avis, Inc.*, (C.A. 9) 316 F.2d 804 16
Treinies v. *Sunshine Mining Company*, 308 U.S. 66, 60 S.Ct. 44, 84 L.Ed. 1034 27
Wayside Transportation Co. v. *Marcell's Express, Inc.*, (C.A. 1) 284 F.2d 868 28
Wells v. *Helms*, (C.A. 10) 105 F.2d 402 24

CONSTITUTIONAL PROVISIONS AND STATUTES

Article IV, Sec. 1, United States Constitution 27
28 U.S.C. § 1292 (a) (1) 2
28 U.S.C. § 1738 27
28 U.S.C. § 2283 ..... 4, 27

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1256

KOEHRING COMPANY,
Petitioner,

vs.

HYDE CONSTRUCTION COMPANY, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION

RESPONSE TO QUESTIONS PRESENTED

We do not agree that the questions as presented by Petitioner for review are expressed accurately in the "terms and circumstances of the case" as required by Rule 23.

I.

The statement of the first question erroneously assumes that there were no further proceedings in the District Court of Oklahoma after remand of the case to that Court as a result of this Court's decision on the "instanter transfer" jurisdictional point; when, in point of fact, the case went back to the District Court as directed and the present appeal was later perfected from a new order of the District Court refusing to sustain a motion to dissolve an injunction.*

II.

The statement of the second question is so deficient in its omission of the terms and circumstances of the case as to be quite misleading. The question is not simply "does 28 U.S.C. § 2283 prohibit the federal court from temporarily restraining the plaintiff from proceeding in the state court suit." Thus overly abbreviated, the question omits several pertinent and, we submit, controlling circumstances as noted below.

(1) The case involves only a proceeding in *civil* contempt solely for the benefit of a private litigant, and the question, as stated, fails to cast the issue in a context involving exclusively the existence or non-existence of private rights to remedial relief. The question, as stated, thus fails in terms to separate the "power" of the Court itself from the "right" of a litigant to benefit from the exercise of the power when events prove that the injunctive order was erroneous and never should have issued.

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*Jurisdiction was based on 28 *U.S.C.*, § 1292 (a)(1). Koehring's motion to dismiss the appeal was overruled and this Court declined to review the decision by denying certiorari on November 14, 1966. See *Koehring Company* v. *Hyde Construction Company*, 385 U.S. 949, 87 S.Ct. 323.

(2) The State Court acted only to the extent of entering a money decree for damages for a breach of contract and did not seek to interfere with a *res*, if any, under control of a Federal Court.

(3) The question leaves out of view the fact that the Koehring Company chose to submit its federal question, as to the effect of the restraining order, to the Supreme Court of Mississippi, and the question was decided in that appellate forum in favor of the jurisdiction of the State Court to proceed, which decision became final on Koehring's election not to seek certiorari review by the Supreme Court of the United States. When the case reached the State Supreme Court on Koehring's appeal, there was no restraining order in effect but, on the contrary, the order of the Oklahoma Federal District Court expressly authorized the parties to participate in the presentation to the State Supreme Court (R. 163, Appx. B).

Actually, Koehring made four elections to reject the Federal forum while it sought the favorable action of the State Courts. *First,* it moved to dismiss the Federal action for want of jurisdiction and sought venue transfer only in the alternative. *Second,* it entered its general appearance in the State Court and elected not to remove the State Court action to the Federal Court, although it was fully removable. *Third,* it initiated and fully participated in the presentation of all issues of every description to the Supreme Court of the State at a time long after the restraining order had expired and after securing an order from the Oklahoma District Court expressly permitting the parties to participate in the appeal to that Court. *Fourth,* after failing to obtain a *full* reversal in the Supreme Court of Mississippi, it elected not to seek review by the Supreme Court of the United States of the federal question adversely decided and now re-asserted in this collateral attack.

(4) The question leaves out of view the fact that the sanctions in question involve a second violation of 28 U.S.C. 2283, in that such take the novel form of an injunction against the State Court's further proceedings to enforce its own judgment, in the production of which all parties fully participated and were fully heard, even to the extent that while neither was wholly successful, each was partially so.*

OTHER QUESTIONS RESERVED

Other questions appeared in the case which were expressly or by necessary implication decided adversely to Respondent. A favorable decision on any one of these would have produced the same end result as that achieved on consideration of the other aspects of this civil case. Since these questions would not be reached in this Court if the application for the writ is denied their existence is mentioned only to avoid any possible waiver argument in the event that this Court should elect to review the decision of the Tenth Circuit.

MATERIAL SUBMITTED IN APPENDIX

Respondent attaches an Appendix containing the following pertinent documents submitted for consideration:

A. Order of Chancery Court dated March 10, 1964, directing the parties to proceed with the trial on March 11, 1964.

B. Injunction issued by the Oklahoma District Court against enforcement of Decree and for re-trial, but allowing all parties to participate on Koehring's appeal to the Supreme Court of Mississippi.

C. Opinions of the Supreme Court of Mississippi, reported in 178 So.2d 838 and 182 So.2d 580.

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*While Hyde obtained a money judgment, Koehring was successful in reducing the award on appeal by $54,889.47 by the elimination of one major item of alleged damages.

D. Judgment of Supreme Court of Mississippi, dated February 7, 1966.

E. Motion of Hyde Construction Company filed in the Oklahoma District Court, styled "Amended and Supplemental Motion to Dissolve Injunction and Vacate Order of Civil Contempt and to Dismiss Cause". (Without exhibits).

F. Opinion of the Court of Appeals for the Tenth Circuit on Hyde's appeal from the order denying the amended and supplemental motion. (388 F.2d 501).

G. Excerpt from brief of Respondent on Petition of Koehring (No. 567) for certiorari review of order overruling motion to dismiss appeal. (Certiorari denied 385 U.S. 949, 87 S.Ct. 323).

RESPONSE TO STATEMENT OF THE CASE

Petitioner's statement of the case is incomplete and fails to place the controlling circumstances before the Court. We take the following statement verbatim from the factual summary as contained in the opinion of the Court of Appeals: *

> "This bitterly contested litigation has cut a tortuous path through federal and state courts since its inception in 1961. It is now before us on an appeal from a denial by the United States District Court for the Northern District of Oklahoma of a motion by appellant Hyde Construction Company to dissolve an injunction which, among other things, restrains Hyde from enforcing a judgment obtained in a Mississippi state court and sustained by the Supreme Court of that state. The judgment awarded Hyde damages for breach of contract by appellee Koehring Company. Consideration of the issues requires an understanding of the appalling background.

*See 388 F.2d 501 for report of this case.

"Hyde was the prime contractor for the construction of a spillway at the federal Keystone Dam project in Oklahoma. Hyde contracted with Koehring for the design and installment by Koehring of a concrete cooling and mixing plant for use by Hyde on the project. Difficulties arose in the performance of the contract. On August 30, 1961, Hyde sued Koehring in the United States District Court for the Southern District of Mississippi to recover damages for the breach of the concrete plant contract. Jurisdiction was based on diversity. On the next day, Koehring sued Hyde in the United States District Court for the Northern District of Oklahoma to recover the unpaid balance of the cost of the plant. This was paid and the Oklahoma suit was dismissed.

"On September 21, 1961, in the Mississippi federal court, Koehring moved to dismiss for lack of jurisdiction or, in the alternative, for change of venue to the United States District Court for the Northern District of Oklahoma. On September 27, 1961, Hyde brought suit in the Chancery Court, Hinds County, Mississippi, against Koehring on the identical cause of action asserted in the Mississippi federal suit. Koehring did not seek to remove this action to the federal court. On June 15, 1962, the Mississippi federal court denied Koehring's motions to dismiss and for change of venue. These rulings were certified for an interlocutory appeal under 28 U.S.C. § 1292(b).

"The United States Court of Appeals for the Fifth Circuit, on September 19, 1963, held that the case should be transferred to the Northern District of Oklahoma and remanded it to the Mississippi federal court for that purpose. See Koehring Company v. Hyde Construction Company, 5 Cir., 324 F.2d 295. Hyde filed a petition for rehearing which was denied on February 5, 1964, and Koehring presented a motion to stay the proceedings in the state court which was denied on January 27.

"On February 16, 1964, Hyde filed in the Mississippi federal court a motion to deny the transfer on the ground of changed circumstances. Hyde also gave notice that, in the event the foregoing motion was denied, it voluntarily dismissed the federal case under Rule 41(a)(1), F.R.Civ.P. Koehring's lawyers mailed to Hyde's lawyers an answer in the federal case on February 20, 1964. Apparently, this was also mailed to the Oklahoma federal court. It was actually not filed until March 11, 1964. On February 24, the Mississippi federal court overruled Hyde's motion to reconsider venue and entered an order for dismissal without prejudice.

"The state court trial was set for March 9, 1964. On March 6, 1964, Koehring obtained from the Court of Appeals for the Fifth Circuit a temporary restraining order prohibiting Hyde from further action in the state court pending determination of an application for mandamus filed by Koehring on March 4. The state court then rescheduled the trial to begin at two o'clock on March 10. On that day the Court of Appeals for the Fifth Circuit in an unpublished opinion vacated the Mississippi federal court's order to dismiss the action and ordered a self-executing instanter transfer to the Northern District of Oklahoma. It also vacated its temporary ex parte restraining order. Meanwhile, the state court trial had been reset for March 11, 1964, at two o'clock P.M. On March 10, Koehring presented to the state court a motion to abate and stay the state proceedings pending the outcome of the trial in federal court. On the same day, the state court entered an order to proceed with the trial. (See Appx. A).

"On the morning of March 11, Koehring presented to the Oklahoma federal court a certified copy of the order for instanter transfer and a motion for an injunction and for an ex parte restraining order. A temporary restraining order was issued before two o'clock P.M. ordering Hyde and its attorneys not to proceed with the state court trial. Telegraphic notice of this order was given to Hyde's attorneys, and the state

court, before which the trial was proceeding, was told of the order. The trial continued and culminated on April 7, 1964, in a judgment in favor of Hyde and against Koehring in the amount of $464,450.08.

"On March 14, the Oklahoma federal court issued an order for the arrest of Vardaman Dunn, an attorney for Hyde, on charges of criminal contempt because of his disobedience of the restraining order. On the same day, the Mississippi state court made an order restraining the United States Marshal from arresting Dunn. Dunn was taken into custody on March 16 and was released on a writ of habeas corpus issued by the United States District Court for the Southern District of Mississippi. On April 8, that court ordered the release of Dunn on the ground that the March 11 temporary restraining order of the Oklahoma federal court was invalid. See Dunn v. Stewart, D.C.S.D. Miss., 235 F.Supp. 955. This decision was reversed by the Court of Appeals for the Fifth Circuit on the ground that the invalidity of the restraining order could not be used to sustain the petition for habeas corpus. See Stewart v. Dunn, 5 Cir., 363 F.2d 591. On April 21, the Mississippi state court enjoined Koehring and its attorneys from proceeding with the case in the Oklahoma federal court.

"On September 1, 1964, the Oklahoma federal court issued an order enjoining Hyde from collecting the Mississippi judgment but permitting Hyde to participate in the appeal to the Mississippi Supreme Court. It also required Hyde and Dunn to reimburse Koehring in the sum of $9,009.08 for damages resulting from the civil contempt committed in violating the March 11 restraining order. Hyde appealed this order to the Court of Appeals for the Tenth Circuit which held that the injunction and contempt proceedings were invalid because the order of instanter transfer was invalid and the Oklahoma federal court had acted before the transfer to it of jurisdiction over the parties and the subject matter. See Hyde Construction Company v. Koehring Company, 10 Cir., 348 F.2d 643. This decision

of the Tenth Circuit was reversed by the United States Supreme Court on January 17, 1966, which held that the Oklahoma federal court had jurisdiction under the instanter transfer. See Koehring Company v. Hyde Construction Company, 382 U.S. 362, rehearing denied 383 U.S. 939.

"On October 4, 1965, the Supreme Court of Mississippi denied the appeal of Koehring, held that the Chancery Court had jurisdiction, and reduced the judgment by about $50,000. See Koehring Company v. Hyde Construction Company, (Miss.) 178 So.2d 838 and 182 So.2d 580. Koehring did not seek review by the United States Supreme Court of this decision. The Mississippi Supreme Court also held that the order of the Chancery Court enjoining Koehring from proceeding in the Oklahoma federal court was invalid. See Koehring Company v. Hyde Construction Company, (Miss.) 178 So.2d 857.

"On March 21, 1966, Hyde filed a motion in the Oklahoma federal court to dissolve the injunction, to vacate the civil contempt order, and to dismiss the case. It asserted, among other things, that the Mississippi judgment was final and barred further procedings in the Oklahoma federal court under the principle of res judicata. These motions were denied April 18, 1966. Hyde then appealed to the Court of Appeals for the Tenth Circuit from the denial of the motion to dissolve. This is the case now before us. Koehring moved for the dismissal of the appeal and we denied the motion on July 27, 1966, by an unpublished opinion. Koehring sought review by certiorari which the Supreme Court denied on November 14, 1966. See Koehring Company v. Hyde Construction Company, 385 U.S. 949.

"After a hearing without a jury, the Oklahoma federal court, on August 23, 1966, found Dunn guilty of criminal contempt because of his violation of the March 11, 1964, restraining order and imposed a 90-day sentence. The appeal of Dunn, our case No. 9142, is

disposed of by an opinion filed contemporaneously with the opinion in this case.

"We have jurisdiction of appeals from interlocutory orders of district courts refusing to dissolve or modify injunctions. See 28 U.S.C., § 1292(a)(1). This appeal is from an order of the district court refusing to dissolve or modify its September 1, 1964, injunction barring Hyde from collecting or enforcing the Mississippi judgment and requiring Hyde to pay damages for the civil contempt which it committed in breaching the March 11, 1964, restraining order.

"We have difficulty with the September 1 orders of the district court. The court recognized the pending appeal in the Mississippi Supreme Court and permitted Hyde to participate therein. At the same time it enjoined Hyde from enforcing the state judgment. It said that the federal trial would proceed as if the Mississippi state case had not been tried and then added that it might take the state judgment into consideration when disposing of the federal case. These actions seem inconsistent to us. The effect is to permit two trials of the same issue—one in state court and one in federal court. Ordinarily, one trial of a controversy is enough."

The above statement fairly presents the general background and demonstrates that the Koehring Company provoked the erroneous issuance of an order to interrupt proceedings in a State Court of competent jurisdiction and now seeks not to vindicate the authority of the District Court but to obtain a private advantage from the error which it provoked in the first instance, responding to which the Court of Appeals said in concluding its opinion* [All footnotes by Court]:

"The basic thrust of Koehring's argument is that, regardless of whether the Oklahoma federal injunction was good or bad, it was issued and destroyed the effi-

*See also 388 F.2d at 510-511.

cacy of the state proceedings and state judgment for all purposes so far as the federal courts are concerned. No decisions of which we are aware support this novel concept. The in personam features of the controversy were thoroughly litigated in the state courts with full participation by Koehring. It voluntarily filed a general appearance in state court. It appealed the adverse judgment to the state supreme court and in that appeal litigated the right of the state court to proceed in the face of the injunction. The state supreme court carefully considered the issue and came to the conclusion that the state court had jurisdiction to proceed.[15] Koehring did not seek review of that decision in the Supreme Court of the United States; and the decision has become final. We have identity of parties—Koehring and Hyde—and identity of subject matter—jurisdiction of the Mississippi court to proceed. The principles of res judicata apply to questions of jurisdiction.[16]

"Koehring seeks to carve out a new exception to the res judicata rule on the basis that the Mississippi proceedings in violation of the Oklahoma federal court order are contrary to the doctrine of federal sovereignty. We grant that the question of the validity of the plea of res judicata on the jurisdictional question now presented is for decision by the federal court.[17] We hold that, in the circumstances of this case, the plea is good. Such conclusion is the surrender of no federal authority. Federal law has long tolerated duplicating or overlapping proceedings in federal and state courts.[18] The dignity of the federal courts is adequately protected by the criminal contempt proceeding with which we are not concerned in this case. A holding that a state court is ousted of jurisdiction

15. See Koehring Company v. Hyde Construction Company, (Miss.) 178 So.2d 838, 842-850.

16. American Surety Co. v. Baldwin, 287 U.S. 156, 166.

17. See Donovan v. City of Dallas, 377 U.S. 408, 412.

18. Hart and Wechsler, The Federal Courts and The Federal System, 1057.

by an invalid order of a federal court would open a Pandora's box to resourceful litigants.

"The March 11, 1964, temporary restraining order ended by its own time limitations and was followed by the September 1, 1964, injunction. Koehring says that Hyde should have appealed from the restraining order, and having failed to do so, may not question the adjudication of civil contempt. When this case was here before we held that the contempt order was so related to the injunction that both could be considered on a § 1292(a)(1) appeal.[19] We believe that the same conclusion is justified on this appeal. In United States v. United Mine Workers of America, 330 U.S. 258, 294-295, no appeal was taken from a temporary restraining order and the court said that there could be no sanctions in civil contempt for violation of an erroneous order. The March 11 order was in effect for only ten days. The general rule is that such orders are not appealable under § 1292(a)(1).[20] The failure to appeal from the temporary order does not foreclose consideration of the validity of that order on this appeal from the injunction and civil contempt judgment which were later entered.

"To hold otherwise would permit a private litigant to take advantage of an error which it provoked in the first instance. The law affords a remedy for a right violated but does not grant relief to the perpetrator of a wrong.[21] A prosecution for criminal contempt vindicates the authority of a court regardless of whether it was properly exercised. Civil contempts provide a remedy for a party who has been injured by the violation of a court order. The right to such rem-

19. Hyde Construction Co. v. Koehring Co., 10 Cir., 348 F.2d 643, 647, reversed on other grounds 382 U.S. 362.

20. See Pan American World Airways, Inc. v. Flight Engineers' International Association, 2 Cir., 306 F.2d 840, 841-842, and Pennsylvania Motor Truck Association v. Port of Philadelphia Marine Terminal Association, 3 Cir., 276 F.2d 931.

21. Salvage Process Corporation v. Acme Tank Cleaning Process Corporation, 2 Cir., 86 F.2d 727.

edy 'falls with an injunction which events prove was erroneously issued.'[22] Accordingly, the adjudication for civil contempt and the penalty imposed therefor cannot stand."

RESPONSE TO PETITIONER'S STATED REASONS

I.

There Is No Conflict with a Prior Decision of This Court in This Case.

Koehring's reference is to the decision of this Court in *Koehring Company* v. *Hyde Construction Company*, (1966) 382 U.S. 362, 86 S.Ct. 522, 15 L.Ed.2d 416, which held that a Court of Appeals may confer transfer jurisdiction upon a transferee District Court by a self-executing instanter transfer order, thereby reversing a contrary decision of the Tenth Circuit in *Hyde Construction Company* v. *Koehring Company*, (C.A. 10, 1965) 348 F.2d 643.

This "conflict" contention is the same point presented to the Tenth Circuit on Koehring's motion to dismiss the appeal in the present case. The motion was overruled and this Court denied Koehring's petition for certiorari. See *Koehring Company* v. *Hyde Construction Company*, (Nov. 1966) 385 U.S. 949, 87 S.Ct. 323. In response to that petition, it was pointed out that the one and only question presented, and hence the only question decided, was whether a Court of Appeals had the authority to enter an effective self-executing order for instanter transfer of a pending case from one district to another. In reversing the Tenth Circuit, this Court held that the transferee court acquired transfer jurisdiction under such an order, but just as the Tenth Circuit reached no other issue on the first appeal, so it was that no other question was presented to or decided by this Court on certiorari review.

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22. United States v. United Mine Workers of America, 330 U.S. 258, 295.

This question was argued to the Court of Appeals both on the motion to dismiss and upon the presentation of the appeal on its merits, and that Court found no conflict with this Court's decision on the transfer point, and fully responded to the argument on the point, concluding: (1) that when the Tenth Circuit acted upon the threshold jurisdictional point on the former appeal, it "did not reach the other issues;" and (2) that the validity of the injunction, apart from the transfer objection, was not discussed or decided, either by the Tenth Circuit or by the Supreme Court.

In remanding the case to the District Court, this Court gave no reason for not remanding instead to the Court of Appeals, but it evidently honored the conclusion expressed in the Tenth Circuit's opinion under review that "Other contentions made on these appeals are either not properly before this Court or are found to be without merit." (348 F.2d at 649).

We do not quarrel with the two cases cited in Koehring's petition: *In re Potts,* 166 U.S. 263, 17 S.Ct. 520, and *Briggs* v. *Pennsylvania R. Co.,* 334 U.S. 304, 68 S.Ct. 1039. These cases simply announce the well settled rule that an inferior court has no power or authority to deviate from the mandate issued by an appellate court. There is no deviation in the case at bar: The Tenth Circuit simply looked at the mandate, along with the question presented and decided, and noted that no part of the mandate decided or pre-empted consideration of the merits of the contentions relating to the validity of the restraining orders as this might affect the right of a private litigant to reap the benefits of sanctions in *civil* contempt. Cf. *Sprague* v. *Ticonic Nat. Bank,* 307 U.S. 161, 59 S.Ct. 777, 83 L.Ed. 1148; *Re Sanford Fork & Tool Company,* 160 U.S. 247, 16 S.Ct. 291, 40 L.Ed. 414; *Ex parte Union Steamboat Company,* 178 U.S. 317, 20 S.Ct. 904, 44 L.Ed. 1084; *Mutual Life Insurance*

Co. v. *Hill,* 183 U.S. 551, 24 S.Ct. 538, 48 L.Ed. 788; *Chas. Wolff Packing Co.* v. *Court of Industrial Relations,* 267 U.S. 552, 45 S.Ct. 441, 69 L.Ed. 785; *Hartford Life Ins. Co.* v. *Blincoe,* 255 U.S. 129, 41 S.Ct. 276, 65 L.Ed. 549; and *Ballard* v. *United States,* 329 U.S. 187, 67 S.Ct. 261, 91 L.Ed. 832.

These and other cases were discussed in our response to Koehring's petition for certiorari review of the order overruling its motion to dismiss this appeal. An excerpt from Respondent's brief on the former petition is attached as Appendix G.

II.

The Decision Below Does Not Conflict with Prior Decisions of Other Courts of Appeal or of This Court.

Koehring's reference is to a restraining order that was issued by the Fifth Circuit ex parte on March 6, 1964, and promptly dissolved on motion four days later on March 10, 1964.* Since the restraining order was issued ex parte and then promptly vacated on motion, it is very difficult to follow petitioner's argument that this in some way established a precedent for requiring the upholding of a restraining order thereafter issued by the District Court in Oklahoma.

It is most difficult to see where any conflict can be carved out of the fact that the Fifth Circuit, for its own reasons, issued and then promptly vacated a restraining order, when the subsequent action by the District Court in Oklahoma did not purport to continue or otherwise deal, and in fact did not deal, with the Fifth Circuit's order, since such had been vacated by the Fifth Circuit before the case reached Oklahoma. The propriety of the Fifth Circuit's ex

*An earlier application for an injunction had been denied by the Fifth Circuit after a hearing.

parte order was never debated since its prompt vacation by that Court made any such question entirely moot.

Koehring next argues that the Tenth Circuit in deciding that the restraining order issued by the District Court in Oklahoma was erroneous, found that such Court was "powerless" to enter an order similar to that which had precedently been issued and then vacated by the Fifth Circuit. But such was not the finding at all. The finding was that the injunction was erroneously issued and, therefore, that the private litigant, Koehring Company, could not be advantaged merely by the exercise of that power. No such question was before the Fifth Circuit at any time and none such was passed upon, and hence there could not be a conflict in any area from any viewpoint.

Koehring cites *Prack* v. *Weissinger*, (C.A. 3) 276 F.2d 446, and *Tanner Motor Livery, Ltd.* v. *Avis, Inc.*, (C.A. 9) 316 F.2d 804. But these cases simply announced the general rule that "judges of co-ordinate jurisdiction, sitting in cases involving identical legal questions under the same facts and circumstances, should not reconsider the decisions of each other." (376 F.2d at 450).

As noted, there was no question put before the Fifth Circuit which can be equated with that which is the basis for the holding of the Tenth Circuit in the present case, viz: that a private litigant may not be advantaged by the exercise of a judicial power which the litigant provoked and which events have shown to have been erroneous.

Koehring cites *American Ins. Co.* v. *Lester*, (C.A. 4) as being in conflict, but that decision is clearly distinguishable. As stated by the Tenth Circuit in its opinion: [Footnote by the Court].

> ". . . The decision in American Ins. Co. v. Lester, 4 Cir., 214 F.2d 578, is distinguishable. The primary scope of that case was to declare rights of a number

of parties and avoid a multiplicity of lawsuits. Equitable considerations required the protection of federal jurisdiction. Here the primary aim is the determination of damages for breach of contract; and no equitable considerations require an injunction against the state proceedings. In our opinion the right to a federal injunction does not flow from the fact that the actions seek damages for breach of contract, a declaratory judgment, and an injunction.[12] Koehring makes no claim that the state proceedings were conducted, or the state judgment obtained, fraudulently or unconscionably. . . ."

Next Koehring cites *Moss* v. *Burkhart*, 220 F.Supp. 149, from a three judge court dealing with reapportionment. There is no similarity of circumstance. The Court there dealt with federal questions in an area largely pre-empted by the federal courts.

Koehring argues that Respondent having first filed this breach of contract action in the Federal Court, it should not be allowed to "circumvent that jurisdiction by provoking a federal-state conflict." But what Petitioner studiously avoids mentioning is that Koehring (1)* promptly challenged the jurisdiction of the Federal Court, seeking venue transfer only in the alternative; (2) elected not to remove the State Court action shortly thereafter filed, although such was clearly removable to the Federal Court; (3) entered its appearance in the State Court and fully participated in the trial and in the appeal and sought relief affirmatively in those Courts; and (4) having lost some part of its case in the State Court of last resort, elected not to seek certiorari review in the Supreme Court

12. See IA, Moore Federal Practice, ¶ 0.220, p. 2604.

*See Order of March 10, 1964 (Appx. A). This was the order resulting from a hearing initiated by Koehring Company on its submission of the "stay" question to the State Court.

of the United States on the basis of the federal question now sought to be relitigated.

Also not mentioned is the fact that at no time prior to final judgment did the State Court place itself in conflict by seeking to stay the trial of the case on its merits in the Federal Court. The State Court by its order directed the parties to proceed in that State Court, but it did not direct them not to proceed in any other court. Hence, there was no conflict until Koehring provoked the Federal District Court in Oklahoma to issue an order directing stoppage of the State Court trial then in progress. The only provocation of conflict was at the hands of Koehring, not at the hands of Respondent. To sanction this conduct by a litigant would be to foster, not avoid, federal-state conflicts.

Finally, we submit that the decision of the Tenth Circuit does not conflict with any prior decision of this Court in the *in rem* v. *in personam* area. The conclusions are entirely consistent with the decisions of this Court and, in fact, the law is so well settled against Koehring's contentions by this and other courts as to leave no room for serious debate.

The judgment rendered by the Mississippi Court was a money judgment for damages for a breach of contract. Nothing in the form of a *res* or *thing* was possessed, impounded or acted upon by that Court.

Koehring's argument here was rejected by the Tenth Circuit in these words* [All footnotes by the Court]:

> "The controlling argument on the validity of the injunction goes to the question of whether it is within one of the exceptions recognized in 28 U.S.C., § 2283. That statute forbids a federal court to enjoin state

*See also 388 F.2d at 508-509.

court proceedings except when expressly authorized by Congress 'or where necessary in aid of jurisdiction, or to protect or effectuate its judgments.' Koehring says that the injunction is necessary to protect the federal jurisdiction.

"The rule is well established that a federal court may restrain proceedings in a state court when necessary to protect the federal court's jurisdiction over a res which is the subject of both the federal and state proceedings.[5] The rule is equally well established that if both federal and state actions are in personam, the actions may proceed simultaneously and the federal court may not enjoin the state proceeding.[6] The question, then, is whether we are dealing with cases in rem.

"Both the federal and state actions seek damages for breach of contract. As such they are actions in personam. The claim of a res arises from the chancery attachment in each case of a creditor of Koehring as permitted by Mississippi law.[7] Under Mississippi law service on the attachment defendant 'does not bring any fund into the possession, custody or control of the Court, no monies are paid into the registry of the Court, and no bond is required.'[8] The only res is the debt owed Koehring in Mississippi. This was attached by Hyde as an aid to juris-

5. See Donovan v. City of Dallas, 377 U.S. 408, 412; Toucey v. New York Life Insurance Co., 314 U.S. 118, 135; Penn General Casualty Co. v. Pennsylvania, 294 U.S. 189, 195; and Denver-Greeley Valley Water Users Association v. McNeil, 10 Cir., 131 F.2d 67, 70.

6. Penn General Casualty Co. v. Pennsylvania, 294 U.S. 189, 195; Kline v. Burke Construction Co., 260 U.S. 226, 230; Skelly Oil Co. v. Phillips Petroleum Co., 10 Cir., 174 F.2d 89, 100, modified in non-pertinent part, 339 U.S. 667; and Guardian Life Insurance Co. v. Kortz, 10 Cir., 151 F.2d 582, 585.

7. See Mississippi Code Annotated (1956), § 2729.

8. Koehring Company v. Hyde Construction Company, (Miss.) 178 So.2d 838, 848, quoting Dunn v. Stewart, D.C.S.D. Miss., 235 F.Supp. 955, 966.

diction in both the federal and state courts. Koehring, for obvious reasons, does not now contest federal jurisdiction. Instead, it relies on the attached res to justify the injunction under the 'in aid of its jurisdiction' exception in § 2283. Parenthetically, we observed that in the circumstances no such aid is required to sustain federal jurisdiction.

"Once jurisdiction is obtained, the only function of the attached res is to afford a means of collecting whatever judgment might be secured. The courts have gone far in permitting simultaneous actions affecting a single res so long as the action taken on the res by one court will not conflict with actions by the other court.[9] Here the basis of each suit is an in personam claim for breach of contract. The attachment is an ancillary proceeding to aid in the collection of whatever judgment might be secured; it has nothing to do with the merits of either case. We have no question here of the enforcement of the state court judgment against the attached res. That judgment specifically dismissed the attachment defendant and does not affect any res within the control of the federal court. The Oklahoma federal court injunction goes beyond the protection of the res and restrains the state in personam proceedings. It is an unnecessary interference with a state court proceeding by the federal court, the very thing that § 2283 and the long-established rules of comity were designed to prevent. This conflict could easily have been prevented by enjoining only that part of the state court proceedings which affected the federal court's control of the attachment debtors.[10] The order

9. See United States v. Klein, 303 U.S. 276; General Baking Co. v. Harr, 300 U.S. 433; and Denver-Greeley Valley Water Users Association v. McNeil, 10 Cir., 131 F.2d 67.

10. In Penn General Casualty Co. v. Pennsylvania, 294 U.S. 189, 198, the Supreme Court said: "While it is often said that of two courts having concurrent jurisdiction *in rem*, that one first taking possession acquires exclusive jurisdiction. * * * it is exclusive only so far as its exercise is necessary for the appropriate control and disposition of the property. The

of the court below restraining the entire state action was not necessary and cannot be sustained.

"The situation is not changed by the fact that in both the federal and state proceedings Hyde sought, in addition to damages for breach of contract, a declaratory judgment and injunctive relief. The declaratory judgment provisions[11] create no statutory exception to § 2283. . . ."

Koehring, strangely enough, cites *Kline* v. *Burke Constr. Co.*, 260 U.S. 226, 43 S.Ct. 79, 67 L.Ed. 226, 24 A.L.R. 1077. This is indeed the landmark case in this area. In this case the plaintiff first filed suit for breach of contract in the Federal Court and sought an accounting. The case resulted in a mistrial. Subsequently, the plaintiff filed the same cause of action in the Chancery Court of Arkansas. The defendant sought an injunction against prosecution of the State Court suit. The Court of Appeals reversed a denial of the injunctive relief and remanded with directions that the injunction issue. The Supreme Court reversed.

Emphasis in this case centered around the concept of *in personam* actions versus *in rem* or *quasi in rem* actions, the latter terms being used only in the sense of actions "which deal either actually or potentially with specific property or objects."

The following are excerpts from the opinion in the cited case:

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jurisdiction does not extend beyond the purpose for which it is allowed, to enable the court to exercise it appropriately and to avoid unseemly conflicts. * * * The other court does not thereby lose its power to make orders which do not conflict with the authority of the court having jurisdiction over the control and disposition of the property."

11. 28 U.S.C. §§ 2201 and 2202, and Rule 57, F.R.Civ.P.

"It is settled that where a federal court has first acquired jurisdiction of the subject-matter of a cause, it may enjoin the parties from proceeding in a state court of concurrent jurisdiction where the effect of the action would be to defeat or impair the jurisdiction of the federal court. Where the action is in rem the effect is to draw to the federal court the possession or control, actual or potential, of the res, and the exercise by the state court of jurisdiction over the same res necessarily impairs, and may defeat, the jurisdiction of the federal court already attached."

ALSO

"But a controversy is not a thing, and a controversy over a mere question of personal liability does not involve the possession or control of a thing, and an action brought to enforce such a liability does not tend to impair or defeat the jurisdiction of the court in which a prior action for the same cause is pending."

ALSO

". . . The rank and authority of the courts (Federal and State) are equal, but both courts cannot possess or control the same thing at the same time, and any attempt to do so would result in unseemly conflict. The rule, therefore, that the court first acquiring jurisdiction shall proceed without interference from a court of the other jurisdiction is a rule of right and of law based upon necessity, and where the necessity, actual or potential, does not exist the rule does not apply. Since that necessity does exist in actions in rem and does not exist in actions in personam, involving a question of personal liability only, the rule applies in the former but does not apply in the latter."

Quoting with approval from an Eighth Circuit decision, the Court referring to the power to enjoin, said:

". . . The pendency of two or more such actions between the same parties upon the same causes of action in different jurisdictions gives to the court in which the first was brought no power to enjoin the prosecution of the others. Each may take its normal course."

The court referred to the duty of the Federal Court to proceed independently when *in personam* relief was requested, and as to the State Court's duty, said:

". . . it was, therefore, equally the duty of the state court to take the case and proceed to judgment. . . ."

In *Penn General Casualty Co.* v. *Commonwealth of Pennsylvania ex rel. Schnader,* 294 U.S. 189, 55 S.Ct. 386, 79 L.Ed. 850, the finding of an absolute necessity of avoiding conflict as a condition precedent to interference with the normal procedures of a State Court was strongly emphasized, the Court saying:

". . . While it is often said that, of two courts having concurrent jurisdiction in rem, one first taking possession acquired exclusive jurisdiction, see Peck v. Jennes, supra, pages 624, 625 of 7 How., 12 L.Ed. 841; Wabash R. Co. v. Adelbert College, supra, page 54 of 208 U.S., 28 S.Ct. 182; Harkin v. Brundage, supra, page 43 of 276 U.S., 48 S.Ct. 268, it is exclusive only so far as its exercise is necessary for the appropriate control and disposition of the property. The jurisdiction does not extend beyond the purpose for which it is allowed, to enable the court to exercise it appropriately and to avoid unseemly conflicts. See Leadville Coal Co. v. McCreery, supra, page 477 of 141 U.S., 12 S.Ct. 28. The other court does not thereby lose its power to make orders which do not conflict with the authority of the court having jurisdiction over the control and disposition of the property. Yonley v. Lavender, 21 Wall. 276, 22 L.Ed. 536,

Heidritter v. Elizabeth Oil-Cloth Co., 112 U.S. 294, 304, 5 S.Ct. 135, 281 L.Ed. 729; Byers v. McAuley, 149 U.S. 608, 13 S.Ct. 906, 37 L.Ed. 867. . . ."

In *Denver-Greeley Valley Water Users Assn.* v. *McNeil,* (C.A. 10th) 131 F.2d 67, the Court also emphasizes the positive requirement of a finding of necessity to support an injunction as an exception to the statute. The rule was expressed thusly:

> "The mere fact that the two suits relate to the same physical property does not justify a restraint of the second suit by the court first acquiring jurisdiction. Empire Trust Co. v. Brooks, 5 Cir., 232 Fed. 641; Harkin et al. v. Brundage et al., 276 U.S. 36, 48 S.Ct. 268, 72 L.Ed. 457. Furthermore, the necessity does not exist which would warrant injunctive relief where the subsequent action does not create a conflict between the courts over the possession or custody of the res."

In *Wells* v. *Helms,* (C.A. 10th) 105 F.2d 402, the court affirmed a case in which the District Judge had refused to proceed. It involved the question of the power of the Court to adjudicate the right of a litigant to share in an estate being administered in a State Court. No request for an injunction was involved, but in dealing with *in personam* jurisdiction allowing both courts to proceed independently without interference, the Court said:

> "An administrator appointed by a state court is an officer of that court and takes possession of the decedent's property in obedience to the orders of the court. His possession is the court's possession and cannot be disturbed by any other court. Byers v. McAuley, 149 U.S. 608, 615, 13 S.Ct. 906, 37 L.Ed. 867.
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> "However, a distributee of an estate, citizen of another state, may establish his right to a share in such estate, and enforce such adjudication against the

administrator personally or his sureties, or against any other person liable therefor, or *proceed in any way which does not disturb the actual possession of the property by the state court.* Byers v. McAuley, supra; Waterman v. Canal-Louisiana Bank Co., 215 U.S. 33, 44, 30 S.Ct. 10, 54 L.Ed. 80; Commonwealth Trust Co. v. Bradford, 297 U.S. 613, 619, 56 S.Ct. 600, 80 L.Ed. 920; Princess Lida of Thurn & Taxis v. Thompson, 305 U.S. 456, 59 S.Ct. 275, 281, 83 L.Ed. 285." (Emphasis added).

III.

The Case Presents No New Important Questions Requiring Settlement by This Court.

Koehring at this point asks this Court to set guidelines as to the power of a Federal Court to enjoin State Court proceedings in cases "neither clearly *in rem* nor clearly *in personam.*"

Here again Petitioner seeks to capture the interest of this Court in considerations of the "power" of a Federal Court over State Court proceedings. And again we find it necessary to point out that no such question of "power", as such, is involved but only a question of the right of a private litigant to reap a financial advantage from the erroneous exercise of that power. More specifically, Petitioner would have the Court create a private right—one which did not precedently exist—by the sheer force of an erroneous injunctive order, issued on its request, which, as events proved, never should have issued.*

*As stated in *Deeds* v. *Gilmer*, 162 Va. 157, 174 S.E. 37, a citation taken from Koehring's brief in the court below:

"... But it is to be borne in mind that an injunction gives rise to no lien or new substantive right, and that it only protects existing rights and liens which are pleaded in the suit in which it is granted. If the violation of the injunction has not damaged any property or rights or prevented the enforcement of a lien which, under the pleadings and proof in the injunction cause, the complainant was legally entitled to have protected,

As to the plea for guidelines in the in rem and in personam aspects of litigation, the guidelines have been clearly drawn since the decision of this court in *Kline* v. *Burke Constr. Co.*, (1922) 260 U.S. 226, 43 S.Ct. 79, 67 L.Ed. 226, 24 A.L.R. 1007.

Application of settled principles to the circumstances in the case at bar fully support the decision below. By way of summary:

(1) Koehring, after electing not to remove the case, elected to present to the State Courts every facet of its contentions, both on the merits of the case and on jurisdictional issues, including the effect on the State Court judgment of the pre-existing restraining order issued by the District Court in Oklahoma.* Then, instead of seeking certiorari review of the federal questions now being re-asserted, it elected to attack the decision of the State Supreme Court collaterally under the form of a proceeding in civil contempt by seeking and obtaining from the Oklahoma District Court an order vacating the judgment and directing a re-trial of the case on its merits. It is settled, however, that its recourse in the circumstances was exclusively by petition to the United States Supreme Court for direct review of the decision of the State Court of

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preserved, or enforced by the injunction, he has not been damaged by its violation, and is not entitled to have remedial punishment imposed upon the violator. To state the last proposition in a different way—where, upon a hearing of the cause, it appears that the injunction should never have been granted to the person complaining of its violation, because, under pleadings and proof in the injunction cause, he was not entitled to have injunctive relief, he has not been injured or damaged by the violation thereof, and is not entitled to have remedial punishment imposed upon the violator; and in such cases the court will not impose upon the violator a remedial punishment. . . ." (174 S.E. at 79).

*See opinions of the Supreme Court of Mississippi reported in 178 So.2d 838 and 182 So.2d 580, attached as Appx. C to this brief.

last resort. See: *Treinies* v. *Sunshine Mining Company*, 308 U.S. 66, 60 S.Ct. 44, 84 L.Ed. 1034; *Angel* v. *Bullington*, 330 U.S. 183, 67 S.Ct. 657; *Lavasek* v. *White*, (C.A. 10) 339 F.2d 861; *Dean Hill Country Club* v. *City of Knoxville*, (C.A. 6) 379 F.2d 321, and cases cited.* The State Supreme Court expressly decided that it had the jurisdiction and duty to proceed to final judgment and the doctrine of res judicata applies equally to jurisdictional questions expressly presented and decided. See *Baldwin* v. *Iowa State Traveling Men's Ass'n*, 283 U.S. 522, 51 S.Ct. 517, 75 L.Ed. 1244; *Treinies* v. *Sunshine Mining Company*, 308 U.S. 66, 60 S.Ct. 44, 84 L.Ed. 1034; *Heiser* v. *Woodruff*, 327 U.S. 726, 66 S.Ct. 853, 90 L.Ed. 970; *Sherrer* v. *Sherrer*, 334 U.S. 343, 68 S.Ct. 1087, 92 L.Ed. 1429; *Johnson* v. *Muelberger*, 340 U.S. 581, 71 S.Ct. 474, 95 L.Ed. 552; and *Durfee* v. *Duke*, 375 U.S. 106, 84 S.Ct. 242, 11 L.Ed.2d 186.

Moreover, the prohibition of 28 U.S.C. 2283 applies to injunctions against enforcement proceeding on a State Court judgment as well as to other and precedent proceedings. This also is settled. See: *Hill* v. *Martin*, 296 U.S. 393, 56 S.Ct. 278, 70 L.Ed. 293. Also: *Central Nat. Bank of Boston* v. *Stevens*, 169 U.S. 432, 18 S.Ct. 402, 42 L.Ed. 807; *Mutual Reserve Fund Life Assn.* v. *Philps*, 190 U.S. 147, 23 S.Ct. 707, 47 L.Ed. 987. The judgment is entitled to be accorded full faith and credit. Article IV, Sec. I, *United States Constitution*, mandated upon every court of the United States by 28 U.S.C. 1738, as to which see: *American Surety Co.* v. *Baldwin*, 287 U.S. 156, 53 S.Ct. 98, 77 L.Ed. 231. This means "not some but full credit." *Davis* v. *Davis*, 305 U.S. 32, 59 S.Ct. 3, 83 L.Ed.

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*See Also: *Parnacher* v. *Mount*, (C.A. 10) 207 F.2d 788, cer. den. 347 U.S. 917, 74 S.Ct. 515, 98 L.Ed. 1073, rehearing den. 347 U.S. 940, 74 S.Ct. 626, 98 L.Ed. 1089; *Dairy Distributors* v. *Western Conference of Teamsters*, (C.A. 10) 294 F.2d 348; *Frazier* v. *East Baton Rouge Parish School Bd.*, (C.A. 5) 363 F.2d 861; *Alleghany Corporation* v. *Kerby*, (C.A. 2) 340 F.2d 311, footnote No. 1.

26. And it matters not that a question of jurisdiction is involved if such was presented to and decided by the Court rendering the judgment. *American Surety Co.* v. *Baldwin*, supra; *Wayside Transportation Co.* v. *Marcell's Express, Inc.*, (C.A. 1) 284 F.2d 868.

(2) Another question presented to and decided by the Supreme Court of Mississippi on Koehring's appeal to that Court dealt with the in personam nature of the case in the light of the state statute dealing with chancery attachments. After reviewing the applicable cases from this Court and others, the Court concluded that: "It appeared, therefore, the Mississippi judgment is not affected by the Federal injunction and prior proceedings in the Federal Court." This conclusion was upon the decisional basis that the only subject matter dealt with by the Mississippi Court was in personam. See: 178 So.2d at 842-850, Appendix C. The question thus decided on Koehring's appeal does not call for a new guideline, since it is res judicata as between these private litigants in their private controversy, bearing again in mind that the present proceedings are civil and not criminal and that vindication of the authority of the District Court is in no way involved.

IV.

It Is Immaterial Whether This Case Will Govern or Have Any Effect on a Companion Criminal Contempt Case.

The criminal case referred to is the one involving Respondent's Mississippi Trial Court attorney. The judgment and ninety day jail sentence was reversed but the case was remanded, in the spirit of the similar action taken by this Court in *Donovan* v. *City of Dallas*, 377 U.S. 408, 84 S.Ct. 1579, 12 L.Ed.2d 409, for further consideration

and action by the District Court. But that case is not now before this Court, since the Government did not seek certiorari review, and in the present posture of the case, the Appellant had nothing to appeal from. Since the issues in the two cases are quite different, we dispute the accuracy of Petitioner's statement that a decision in the present case will also govern the criminal case or that this Court should be concerned therewith on the civil record filed herein.

CONCLUSION

We respectfully submit that the petition for writ of certiorari should be denied.

Respectfully submitted

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